BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MYRTLE R. STURDIVANT	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,926
FIDELITY BANK	)	
Respondent	)	
AND	)	
	)	
FREMONT COMPENSATION GROUP	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 18, 2000 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on January 12, 2001, in Wichita, Kansas.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board, the parties stipulated that claimant's pre-injury average weekly wage, including overtime and additional compensation items, was $421.76.

ISSUES

This is a claim for a series of injuries caused by overuse or repetitive micro-traumas that occurred from April 1, 1999, through claimant's last day of work for respondent on September 9, 1999. Claimant alleges that she injured both upper extremities and her neck while working for respondent.

In the August 18, 2000 Award, Judge Clark awarded claimant a 14 percent permanent partial general disability. The Judge denied claimant's request for a work

disability (a permanent partial general disability greater than the functional impairment rating) because claimant did not make a good faith effort to find appropriate employment as she had noted on some of her resumes that she had a pending workers compensation claim. Moreover, the note also stated that any new employer could be held liable for any aggravation to her upper extremities. Without considering claimant's post-injury ability to earn wages, the Judge determined that claimant's permanent partial general disability should be limited to her 14 percent whole body functional impairment rating.

Claimant contends Judge Clark erred. Claimant argues that she has a 67.5 percent work disability, which is based upon a 100 percent wage loss and a 35 percent task loss. In the alternative, if a post-injury wage should be imputed, claimant contends she has a 34 percent wage loss and a 35 percent task loss, which creates a 34.5 percent permanent partial general disability. Claimant also contends that she was truthful in the notes added to her resumes and, therefore, such statements should not be the basis for finding that claimant failed to make a good faith effort to find employment. Additionally, claimant argues that both of the labor market experts who testified in this claim, Jerry D. Hardin and Jane Hollingshead, agreed that claimant had made a good faith effort to find appropriate employment and, therefore, the uncontroverted evidence from those two experts establishes that claimant made a good faith effort to find work. Finally, claimant argues that Dr. J. Mark Melhorn failed to properly use the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) when he evaluated claimant's functional impairment and, therefore, the Judge erred by failing to adopt Dr. Daniel D. Zimmerman's 18 percent whole body functional impairment rating.

Conversely, respondent and its insurance carrier contend claimant sabotaged her efforts to find work by threatening potential new employers with liability for her injuries. They further argue that claimant is not entitled to receive a work disability as (1) claimant was fired for reasons unrelated to her work-related injuries and (2) claimant retains the ability to earn a comparable wage and, therefore, is not entitled to a work disability. Additionally, respondent and its insurance carrier argue that the task loss based upon Jerry D. Hardin's analysis is defective and should not be used as claimant was confused as how to define repetitive duties.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. While working for respondent as a records vault clerk, in approximately April 1999 claimant developed pain in her arms, shoulders, and neck along with numbness in her fingers and hands. After seeing her family physician, claimant reported her symptoms to respondent who referred her for medical care.

2. After seeing other physicians, in early July 1999 claimant began treating with board certified orthopedic surgeon Dr. J. Mark Melhorn. The doctor initially diagnosed painful right and left upper extremities, shoulders and neck along with neurapraxia. After conducting nerve conduction tests, the doctor diagnosed bilateral carpal tunnel syndrome and bilateral ulnar nerve syndrome at the elbows.

3. After injections and exercises failed to relieve claimant's symptoms, Dr. Melhorn recommended surgery, which claimant declined. The doctor then rated claimant using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and determined that claimant had a 10.4 percent whole body functional impairment.

4. Dr. Melhorn did not rate claimant's neck as he found no objective evidence of impairment in that area of the body. Further, in determining claimant's impairment to the upper extremities, the doctor did not rate the wrists and elbows separately but, instead, looked at the anatomical dermatomes.

5. When claimant initially consulted with Dr. Melhorn, the doctor restricted her to light to medium work; no lifting more than 35 pounds at any time; limit frequent lifting to 20 pounds or less; and no working with the hands above the shoulders. But despite claimant's failure to improve with treatment, the only restriction the doctor gave claimant at the time of her release in October 1999 was an instruction to rotate her tasks. During the litigation of this claim, the parties deposed Dr. Melhorn who then testified that claimant should not work beyond the medium labor category and, therefore, limit her maximum lifts to 50 pounds and her frequent lifting to no more than 25 pounds. The doctor also testified that he did not restrict claimant from repetitive hand activities as he believed that restriction was included in requiring task rotation.

6. At her attorney's request, claimant was evaluated by Dr. Daniel D. Zimmerman, who examined claimant in October 1999. At that time, claimant continued to experience pain in her neck, trapezius, and upper extremities. Using the AMA *Guides*, Dr. Zimmerman determined that claimant had an 18 percent whole body functional impairment. But unlike Dr. Melhorn, Dr. Zimmerman found claimant had permanent impairment in her neck.

7. Dr. Zimmerman also placed permanent work restrictions on claimant. The doctor testified that claimant should limit occasional lifting to no more than 20 pounds; frequent lifting to no more than 10 pounds; avoid frequent flexion/extension, twisting, torquing, pushing, pulling, hammering, and reaching with the upper extremities; avoid hyperflexion and hyperextension of the cervical spine; and avoid holding her spine in a captive position.

8. Respondent initially accommodated claimant's injuries and permitted her to continue working. But in approximately July or August 1999, respondent advised claimant that the company could no longer provide accommodations for her and that her records vault clerk job was being eliminated anyway.

9. Rather than accepting the layoff, which would have resulted in claimant receiving a severance package, claimant applied for a teller's job at one of respondent's branches. After participating in a two-week training program but failing a required examination, claimant was terminated. Because claimant was terminated, respondent determined that claimant was not entitled to receive the severance package that she otherwise would have received. After notifying claimant of the layoff, at no time did respondent offer claimant accommodated work. Claimant's last day of work with respondent was approximately September 9, 1999.

10. At the time of the regular hearing in May 2000, claimant was 41 years old. Although claimant only completed nine years of formal education, she had obtained her GED. Between her termination and the regular hearing, claimant had contacted approximately 300 potential employers but had no success in obtaining a job.

11. Claimant prepared resumes and provided them to some of the potential employers. On some of the resumes, claimant added the following handwritten note:

> According to my attorney:
>
> I am by law to let you know I have Carpal Tunnel Syndrome in both wrists, both elbows, both shoulders to the neck.
>
> Currently there is a law suit [sic] pending against work comp. I do not at this time have my rating for total damage done/disabilities of my limbs/limitations. And that you may be held responsible for any aggravation to my condition by the courts, upon my hi[re] by you.
>
> I am also needing min of $350.00 a wk & full time work.

12. At her attorney's request, claimant saw labor market expert Jerry D. Hardin, who interviewed claimant and analyzed the jobs that claimant had performed in the 15-year period before she developed her injuries. From claimant's past 14 jobs, Mr. Hardin identified approximately 139 tasks. Mr. Hardin said some were duplicates, but he did not identify which tasks were duplicates and which were not.

13. Reviewing Mr. Hardin's task list, both Dr. Zimmerman and Dr. Melhorn identified a number of tasks that claimant should no longer perform. Dr. Zimmerman indicated that claimant has lost the ability to perform at least 48 (or approximately 35 percent) of the 139 former work tasks. But according to Dr. Melhorn, claimant has lost the ability to perform

six (or approximately four percent) of the 139 tasks.[1] Moreover, Dr. Melhorn acknowledged that there were other former tasks that claimant would be challenged to perform due to her injuries.

14. The Board finds that claimant's task loss lies somewhere between the 35 percent indicated by Dr. Zimmerman and the four percent indicated by Dr. Melhorn. The Board averages those percentages and concludes that claimant has lost the ability to perform approximately 20 percent of the work tasks that she performed in the 15-year period before she developed her injuries. Furthermore, the Board adopts the Judge's finding that claimant sustained a 14 percent whole body functional impairment due to her work-related injuries.

15. The parties stipulated that claimant's pre-injury average weekly wage for purposes of this claim is $421.76, which includes $9.56 for overtime and $72.20 for fringe benefits. As of the date of the regular hearing, claimant was unemployed. But according to Mr. Hardin, claimant retains the ability to earn approximately $280 per week as a base wage. Also, Mr. Hardin believes many companies would provide claimant with a fringe benefit package comparable to that provided by respondent.

16. Respondent and its insurance carrier hired vocational rehabilitation counselor Jane Hollingshead, who testified that claimant retains the ability to earn between $6.50 and $8.24 per hour. What is more, Ms. Hollingshead believes that claimant could sell products over the telephone and earn a base wage plus an additional $20 per hour in commissions despite the fact that claimant has not earned such wages during the 15 years before developing the subject injuries.[2]

17. Considering and weighing the various opinions, the Board concludes that claimant retains the ability to earn $280 per week in base wages and approximately $72.20 per week in additional compensation items for a total of $352.20 per week.

CONCLUSIONS OF LAW

1. The Award should be modified to increase the permanent partial general disability from 14 percent to 18 percent.

---

[1] Dr. Melhorn identified two tasks that he believed claimant could no longer perform and another four that he believed claimant could only partially perform. As a task cannot be completed unless the worker can perform all of it, those four tasks that Dr. Melhorn indicated that claimant could only partially perform are included in the total number of tasks that claimant has lost the ability to perform as a result of her injuries.

[2] Ms. Hollingshead testified that she met with this Board who then taught her how to analyze task loss and permanent partial general disability. The Board does not recall ever formally or informally meeting with Ms. Hollingshead and its members are puzzled by her statement.

2. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against having a work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to perform an accommodated job, which the employer had offered and which paid a comparable wage. Moreover, in *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

3. Considering and weighing all of the facts, the Board agrees with the Judge that claimant failed to make a good faith effort to find appropriate employment following her termination from respondent's employment in September 1999. There is nothing wrong, per se, with workers advising potential employers of their restrictions and their need for accommodations when that information is relevant to a specific job. But the Board

---

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Copeland*, p. 320.

concludes that the handwritten note that claimant placed on her resumes goes beyond informing a potential employer of relevant restrictions; instead, the note either intentionally or unintentionally constituted a veiled threat against potential employers. The practical effect is to dissuade an employer from considering her for hire. Claimant argues she was just being honest. Of course, candor is the best policy but it must be tempered with common sense.

Furthermore, in analyzing good faith, the Board notes that although respondent and its insurance carrier hired a vocational rehabilitation expert to analyze claimant's task loss, they failed to provide claimant with any help in obtaining another job. Despite that lack of assistance from respondent and its insurance carrier, claimant sent out approximately 300 resumes. But, despite the large number of resumes, the Board finds that a reasonable person would recognize that there were problems with the resume, or the manner in which the job search was being conducted, when the resumes yielded such little success after the first or second hundred or so.

4. Because claimant failed to prove that she made a good faith effort to find appropriate employment, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. As indicated in the findings above, claimant retains the ability to earn $352.20 per week. Comparing that wage to the stipulated $421.76 pre-injury wage, claimant has sustained an approximate 16 percent wage loss.

5. Claimant is entitled to a work disability (a disability rating greater than the functional impairment rating) as respondent could no longer accommodate her work restrictions and failed to provide her with another job.[6] Averaging the 20 percent task loss with the 16 percent wage loss creates an 18 percent permanent partial general disability.

The Board notes that the task list prepared by Mr. Hardin includes duplicate tasks. But Mr. Hardin was not asked and, therefore, did not identify which tasks were duplicates and which were not. As tasks from different jobs having the same title may or may not be performed in the same manner or require the same physical motions or stamina, it is incumbent upon the parties to present evidence identifying the duplicate tasks in the event they are to be excluded in determining a worker's task loss. The Board will not speculate. Therefore, the Board has considered all 139 tasks in determining claimant's task loss.

AWARD

WHEREFORE, the Board modifies the August 18, 2000 Award and increases the permanent partial general disability from 14 percent to 18 percent.

---

[6] See *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, syl. 2, 993 P.2d 1246 (1999).

Myrtle R. Sturdivant is granted compensation from Fidelity Bank and its insurance carrier for a September 9, 1999 accident and resulting disability. Based upon an average weekly wage of $421.76, Ms. Sturdivant is entitled to receive 74.70 weeks of permanent partial general disability benefits at $281.19 per week, or $21,004.89, for an 18 percent permanent partial general disability, making a total award of $21,004.89, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director